IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

BYRON DONALD WIESE, Petitioner, vs. STATE OF IOWA,[1] Respondent.	No. C 00-0112-MWB **MEMORANDUM OPINION AND ORDER REGARDING AMENDED REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

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[1] As Judge Zoss correctly observed in the Report and Recommendation presently before the court, the proper party respondent in a *habeas* action is not the State, but "the person having custody of the person detained." 28 U.S.C. § 2242, 2243; Rule 2(a), Rules Governing § 2254 Cases; *Braden v. 30th Judicial Circuit Ct. of Ky.*, 410 U.S. 484, 494-95 (1973). However, as Judge Zoss also observed if the court finds that the respondent's motion to dismiss should be granted, the failure to name a proper party respondent in this case will be moot.

This matter comes before the court pursuant to the July 23, 2002, Amended Report and Recommendation filed by Magistrate Judge Paul A. Zoss concerning petitioner Byron Donald Wiese's petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. Judge Zoss recommends that the court grant the respondent's motion to dismiss Wiese's petition. Wiese's counsel filed objections to the Report and Recommendation on July 25, 2002, and Wiese filed a "Pro Se Amendment To Petitioner's Objections To Report And Recommendation On Motion To Dismiss" on August 2, 2002.

I. INTRODUCTION

A. Background To The Petition

On October 13, 1998, pursuant to a plea agreement, Wiese pleaded guilty to charges of bribery and a third offense of operating a motor vehicle while intoxicated (OWI). Pursuant to the plea agreement, other charges against Wiese were dropped, and he was sentenced to the Larry Nelson Center rather than prison. However, in March 1999, in the

course of disciplinary proceedings arising from Wiese's failure to provide a urine sample, an administrative law judge (ALJ) allegedly "resentenced" Wiese to prison upon the ALJ's finding that Wiese's original sentence to a treatment center was "illegal," because his bribery conviction made him ineligible for placement in a treatment center. After various attempts to pursue state remedies for what Wiese alleges was his improper "resentencing" by the ALJ, Wiese filed his *pro se* application to proceed *in forma pauperis* on a petition for federal *habeas corpus* relief in this matter on July 10, 2000.

B. The First Report And Recommendation

By order dated December 1, 2000, upon initial review of Wiese's *in forma pauperis* application and petition for *habeas* relief, Judge Zoss appointed counsel for Wiese and directed counsel to assist Wiese in filing an amended petition. However, counsel filed a status report on January 18, 2001, notifying the court that counsel believed that any possible claims Wiese might have were procedurally defaulted, unexhausted, and/or without merit. Judge Zoss filed a Report and Recommendation in this case on March 1, 2001, recommending that the court dismiss the petition without prejudice.

The undersigned took a different view. By order dated July 25, 2001, the undersigned rejected the March 1, 2001, Report and Recommendation, based on the undersigned's conclusion that both Judge Zoss and Wiese's own *habeas* counsel had misconstrued Wiese's claims for relief. Based on the undersigned's reading of Wiese's original petition and various other filings, the undersigned concluded that the focus of Wiese's petition was an attempt to plead unconstitutional conduct of the ALJ in "resentencing" Wiese to prison instead of a treatment center as contemplated by Wiese's plea agreement and the order of the sentencing judge in state court. Therefore, the undersigned referred this matter back to Judge Zoss, directing that Judge Zoss, *inter alia*, determine whether or not new counsel should be appointed to represent Wiese in this matter; specify the time within which Wiese

would be required to file a second amended petition, with the assistance of counsel; and determine whether an answer by the respondent should be required to such second amended petition.

C. The Second Amended Petition And The Motion To Dismiss

By order dated July 31, 2001, Judge Zoss appointed new counsel to represent Wiese in this matter and directed that Wiese file, with the assistance of new counsel, a second amended petition. On August 24, 2001, Wiese completed his sentence and was released from custody. Nevertheless, after various extensions, Wiese filed a Second Amended Petition for Writ of Habeas Corpus on November 9, 2001.

As characterized by Judge Zoss in his Report and Recommendation, without objection from either Wiese or his counsel, Wiese's claims for relief in his Second Amended Petition are the following: (1) failure of trial counsel to advise Wiese that a bribery conviction would make him ineligible to be sentenced to the Larry Nelson Center, which was the only reason he agreed to enter a guilty plea; (2) violation of procedural and substantive due process rights in connection with the administrative hearing concerning his failure to provide a urine sample, which led to his "resentencing" to prison; (3) denial of his right to counsel during the administrative hearing, which Wiese alleges "was a criminal proceeding and not an administrative proceeding"; (4) and ineffective assistance of appellate counsel in failing to order a transcript of the administrative hearing or his sentencing and failing to advise the Iowa Supreme Court fully of the nature of Wiese's claims for relief. As a result of these various violations of his constitutional rights, Wiese alleges that he was required to serve his sentence in prison instead of in a treatment center, as contemplated by his plea agreement, and as ordered by the state district court judge who originally sentenced him.

Upon initial review on November 19, 2001, Judge Zoss directed that the respondent answer the Second Amended Petition or file a dispositive motion not later than December

28, 2001. Following an extension of time to do so, the respondent filed a motion to dismiss on January 4, 2002, asserting, *inter alia*, that Wiese's claims were mooted by his release from custody. Wiese resisted the motion to dismiss, after an extension of time to do so, on January 30, 2002.

D. The Second Report And Recommendation

In an Amended Report and Recommendation, filed on July 23, 2002, Judge Zoss addressed the respondent's motion to dismiss. Judge Zoss concluded that Wiese's claim of ineffective assistance of counsel was dismissed on independent and adequate state-law grounds, to the extent that it had been presented to the Iowa state courts, and to the extent it had not been so presented, it had not been exhausted. Moreover, Judge Zoss concluded that whether or not Wiese's trial counsel advised him effectively concerning the consequences of his guilty plea was an issue that was not impacted at all by whether or not the ALJ exceeded her authority in transferring Wiese from the Larry Nelson Center to prison.

As to the remaining claims for relief, Judge Zoss found that Wiese had been released from custody, and that he "has not raised the possible impairment of a hypothetical 1983 action as a collateral consequence if he is not allowed to proceed with this *habeas* action." Amended Report and Recommendation, 8. As a consequence of this omission, Judge Zoss concluded that the continued viability of *Leonard v. Nix*, 55 F.3d 370 (8th Cir. 1995), in light of *Spencer v. Kemna*, 523 U.S. 1 (1998), was "irrelevant to what the court must decide here." *Id.* Rather, Judge Zoss concluded that the "collateral consequences" within the meaning of *Leonard* upon which Wiese had relied, loss of his right to vote and right to bear arms, related solely to his conviction, not the ALJ's actions. Judge Zoss concluded that Wiese has asserted no collateral consequences arising from the fact that he was required to serve his sentence in prison rather than in a treatment center and that Wiese's petition

was, therefore, moot. Judge Zoss also concluded that Wiese had failed to demonstrate that he met any of the other exceptions to the general mootness doctrine described in *Hohn v. United States*, 262 F.3d 811 (8th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3581 (March 5, 2002) (No. 01-1340). Judge Zoss recommends that respondent's motion to dismiss be granted, and that Wiese be denied a certificate of appealability, because he has not raised issues that might constitute a substantial showing that he was deprived of a constitutional right.

Wiese's counsel filed objections to the Amended Report and Recommendation on July 25, 2002. Wiese also filed *pro se* objections, styled as an "amendment" to counsel's objections, on August 2, 2002. Therefore, the Amended Report and Recommendation and objections to it are now fully submitted for the undersigned's consideration.

II. LEGAL ANALYSIS

A. Standard Of Review

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g.*, *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). However, the plain language of the statute governing review provides only for *de novo*

review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Therefore, portions of the proposed findings or recommendations to which no objections are filed are reviewed only for "plain error." *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (reviewing factual findings for "plain error" where no objections to the magistrate judge's report were filed). The court finds that *de novo* review of certain portions of Judge Zoss's Amended Report and Recommendation is required in this case, in light of objections filed by Wiese's counsel and by Wiese, himself, *pro se*.

B. Petitioner's Counsel's Objections

1. Counsel's contentions

Wiese's counsel asserts that Judge Zoss erroneously recommended that the respondent's motion to dismiss be granted, because he failed to examine the allegations of Wiese's Second Amended Petition. Specifically, he contends that Judge Zoss improperly failed to address the continued viability of *Leonard v. Nix*, 55 F.3d 370 (8th Cir. 1995), in light of *Spencer v. Kemna*, 523 U.S. 1 (1998), based on Judge Zoss's erroneous conclusion that Wiese had not alleged impairment of a future action pursuant to 42 U.S.C. § 1983 as a "collateral consequence" establishing the continuing viability of Wiese's petition for *habeas corpus* relief, notwithstanding his release from custody. To the contrary, Wiese's counsel points out that Wiese alleged the following:

> Despite Petitioner's release, Petitioner is entitled to relief from this Court due to the remaining effects of his conviction and his unconstitutional incarceration, which may give rise to an action for damages pursuant to 42 U.S.C. § 1983. Pursuant to *Leonard v. Nix*, 55 F.3d 370 (8th Cir. 1995), that is sufficient cause for the Court to retain jurisdiction of this case.

Second Amended Petition, ¶ 37. Wiese's counsel argues that, under the standards applicable to a motion to dismiss, this court must accept these allegations as sufficient to

allege "collateral consequences." Therefore, Wiese's counsel argues, Wiese has asserted collateral consequences arising out of the fact that he was required to serve his sentence in prison rather than in the treatment center. Counsel urges the court to remand this action to Judge Zoss for further consideration, or in the alternative, urges this court to conclude that *Leonard* is still valid, because *Spencer* only applied to parole revocations, as stated in *Hohn*, 262 F.3d at 818, and no parole revocation is at issue here.

2. Leonard and "collateral consequences"

In *Leonard*, the Eighth Circuit Court of Appeals framed the question of the "mootness" of a *habeas* petition, as follows:

> A petition for habeas corpus must be filed while the petitioner is in custody. *See Maleng v. Cook*, 490 U.S. 488, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989). If a petitioner, though released from custody, faces sufficient repercussions from his allegedly unlawful punishment, the case is not moot. *See Carafas v. LaVallee*, 391 U.S. 234, 239-40, 88 S. Ct. 1556, 1560-61, 20 L. Ed. 2d 554 (1968) (a habeas petitioner "should not be . . . required to bear the consequences of [an] assertedly unlawful conviction simply because the path has been so long that he has served his sentence"). Collateral consequences are presumed to stem from a criminal conviction even after release. *See Sibron v. New York*, 392 U.S. 40, 57, 88 S. Ct. 1889, 1899, 20 L. Ed. 2d 917 (1968) (only possibility of collateral consequence needed to avoid mootness). Where the allegedly illegal punishment does not produce any collateral consequences independent of the underlying conviction, the case will be mooted by physical release. *See Lane v. Williams*, 455 U.S. 624, 632-33, 102 S. Ct. 1322, 1327-28, 71 L. Ed. 2d 508 (1982) (parole violation has no collateral consequences); *Cox v. McCarthy*, 829 F.2d 800, 803 (9th Cir. 1987) (objections to penalty rather than conviction not enough to avoid mootness).

Leonard, 55 F.3d at 372-73. This court agrees with Judge Zoss that, because Wiese relies on *Leonard* for his assertion that "collateral consequences" establish that his petition is not moot, this court need not consider the question of whether *Leonard* was overruled by *Spencer*

v. Kemna, 523 U.S. 1 (1998), *unless* Wiese can point to "collateral consequences independent of the underlying conviction" that were produced by the allegedly illegal punishment, that is, by Wiese's incarceration in prison rather than at a treatment center. *See Leonard*, 55 F.3d at 373.

3. Sufficiency of the pleading of "collateral consequences"

a. Applicable standards

The court concludes that Wiese's counsel has misconstrued the standards for a motion to dismiss when he argues that Wiese has adequately alleged the necessary "collateral consequences." It is true that, in considering a motion to dismiss under Rule 12(b)(6), the court must assume that all facts alleged in the plaintiff's complaint, or petitioner's petition, are true, and must liberally construe those allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Gross v. Weber*, 186 F.3d 1089, 1090 (8th Cir. 1999) ("On a motion to dismiss, we review the district court's decision de novo, accepting all the factual allegations of the complaint as true and construing them in the light most favorable to [the non-movant]."); *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 519 (8th Cir. 1999) ("We take the well-pleaded allegations in the complaint as true and view the complaint, and all reasonable inferences arising therefrom, in the light most favorable to the plaintiff."); *Gordon v. Hansen*, 168 F.3d 1109, 1113 (8th Cir. 1999) (same); *Midwestern Machinery, Inc. v. Northwest Airlines*, 167 F.3d 439, 441 (8th Cir. 1999) (same); *Wisdom v. First Midwest Bank*, 167 F.3d 402, 405 (8th Cir. 1999) (same); *Duffy v. Landberg*, 133 F.3d 1120, 1122 (8th Cir.) (same), *cert. denied*, 525 U.S. 821 (1998); *Doe v. Norwest Bank Minn., N.A.*, 107 F.3d 1297, 1303-04 (8th Cir. 1997) (same); *WMX Techs., Inc. v. Gasconade County, Mo.*, 105 F.3d 1195, 1198 (8th Cir. 1997) (same); *First Commercial Trust v. Colt's Mfg. Co.*, 77 F.3d 1081, 1083 (8th Cir. 1996) (same). However, the court is also mindful that, in treating the factual allegations of a complaint as true pursuant to Rule 12(b)(6), the court must "reject conclusory allegations of law and unwarranted

inferences." *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997) (citing *In re Syntex Corp. Securities Lit.*, 95 F.3d 922, 926 (9th Cir. 1996)); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (the court "do[es] not, however, blindly accept the legal conclusions drawn by the pleader from the facts," citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987), and 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 595-97 (1969)); *see also LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995) (the court "need not accept as true legal conclusions or unwarranted factual inferences," quoting *Morgan*, 829 F.2d at 12). Conclusory allegations need not and will not be taken as true; rather, the court will consider whether the *facts* alleged in the petition, accepted as true, are sufficient to state a claim upon which relief can be granted. *Silver*, 105 F.3d at 397; *Westcott*, 901 F.2d at 1488.

b. Sufficiency of Wiese's allegations

The allegations of "collateral consequences" here are not sufficient to sustain Wiese's petition over a mootness challenge in light of his release from custody. First, the cited portion of Wiese's petition makes no attempt whatsoever to allege a *factual basis* for any "remaining effects of [Wiese's] conviction and his unconstitutional incarceration." *See* Second Amended Petition at ¶ 37. Instead, Wiese has done no more than plead, in conclusory fashion, that there are such "remaining effects." However, conclusory allegations are not sufficient to state a claim upon which relief can be granted. *See, e.g.*, *Silver*, 105 F.3d at 397; *Westcott*, 901 F.2d at 1488. Furthermore, Judge Zoss considered, and properly rejected, Wiese's contention in his brief in resistance to the motion to dismiss that "collateral consequences" consisted of loss of his right to vote and right to bear arms. This court agrees with Judge Zoss that these are consequences flowing from Wiese's *conviction*, not his incarceration in prison rather than in a treatment center, and thus, these "consequences" are *not* sufficient under *Leonard* to sustain Wiese's claims arising from alleged unconstitutional "resentencing" to prison. *See Leonard*, 55 F.3d at 373

(the allegedly illegal punishment must produce collateral consequences independent of the underlying conviction). Wiese's contrary allegation that, "[p]ursuant to *Leonard*," there "is sufficient cause for the Court to retain jurisdiction of this case" is merely a legal conclusion, which the court is not required to accept as true. *Silver*, 105 F.3d at 397; *Westcott*, 901 F.2d at 1488. Judge Zoss correctly concluded that there was no adequate allegation of "collateral consequences" to satisfy the requirements of *Leonard.* In the absence of any adequate allegation of "collateral consequences," Judge Zoss also properly concluded that the continued viability of *Leonard* was not at issue. Counsel's objections to the Amended Report and Recommendation will be overruled.

C. Petitioner's Pro Se Objections

1. Reason for transfer to prison

Wiese's *pro se* objections are several, and the court will attempt to address them in turn. First, Wiese objects to Judge Zoss's purported conclusion that the ALJ revoked his placement in a treatment center "as a result" of the urine sample issue. Judge Zoss cited paragraphs 5 and 6 of Wiese's first counsel's status report of January 18, 2001, in support of his finding that "as a result" of Wiese's refusal or inability to provide a urine sample, the ALJ revoked Wiese's placement at the Larry Nelson Center and instead placed him at the Iowa prison in Clarinda. *See* Report and Recommendation at 2 (citing Counsel's Status Report of January 18, 2001, ¶ 3). The undersigned does not know why Judge Zoss would have relied upon a status report by prior counsel, where this court concluded in review of Judge Zoss's first Report and Recommendation in this case that Wiese's first counsel had misconstrued Wiese's claims, and more importantly, where a Second Amended Petition had subsequently been filed by different counsel. Again, on a motion to dismiss, the court must assume that all facts alleged *in the plaintiff's complaint, or petitioner's petition*, are true. *See Conley*, 355 U.S. at 45-46.

Rather than looking to a status report by former counsel, the court concludes that the pertinent factual allegations concerning the ALJ's revocation of Wiese's placement in the Larry Nelson Center are to be found in the following paragraph of Wiese's Second Amended Petition:

> 12. The ALJ stated that Petitioner's original sentence was illegal, revoked his stay at the LANC, and on or about March 15, 1999, ordered the Petitioner to serve the balance of his sentence in the Iowa prison system. Petitioner subsequently was incarcerated at the Clarinda Correctional Facility in Clarinda, Iowa.

Second Amended Petition at ¶ 12. It is these allegations of the reasons for Wiese's placement in prison that must be taken as true. *See Conley*, 355 U.S. at 45-46. Thus, Wiese's objection to Judge Zoss's characterization of the reason for the ALJ's revocation of Wiese's placement in the Larry Nelson Center will be sustained.

Nevertheless, any mistake in Judge Zoss's statement of the reason that the ALJ revoked Wiese's placement in the Larry Nelson Center has nothing to do with the continuing viability of Wiese's petition in light of his release from custody under *Leonard.* Consequently, it has no effect on the correctness of Judge Zoss's ultimate recommendation that Wiese's petition should be dismissed.

2. "Administrative" or "criminal" proceedings

Next, Wiese contends that the proceedings before the ALJ were not an "administrative" matter, but a "criminal" matter, and that the ALJ plainly exceeded her authority under the provisions of the Iowa Code providing for administrative removal from the OWI program. This "objection" is no more than a restatement of one of Wiese's contentions, not an objection to a factual finding or legal conclusion underlying Judge Zoss's conclusion that the claim is moot. Thus, even assuming that Judge Zoss concluded that the proceedings before the ALJ were "administrative," not "criminal"—which is not a conclusion that this court finds anywhere in the Amended Report and

Recommendation—such a conclusion was not, in any way, determinative of Judge Zoss's conclusion that Wiese's claims are moot. Thus, this objection is overruled as unsupported by the record and irrelevant.

3. "Refusal" to provide urine sample

Wiese also objects to Judge Zoss's finding that he "refused or was unable" to provide a urine sample, because there is no basis in the record for any finding that he was anything but "unable" to provide such a sample. Judge Zoss again, and improperly, relied upon the status report filed by Wiese's prior counsel as support for the statement that "Wiese either refused or was unable to provide a urine sample." *See* Report and Recommendation (citing Counsel's Status Report of January 18, 2001, ¶ 3). Again, the court finds that the pertinent allegation (which again must be taken as true, *see, e.g., Conley*, 355 U.S. at 45-46) is in the Second Amended Petition. That allegation states, "Petitioner informed the staff that he was unable to urinate on command and they would have to wait until he was able to urinate." Second Amended Petition at ¶ 7. This objection is, therefore, sustained, but the court again concludes that it is not dispositive, in any way, of the respondent's motion to dismiss Wiese's petition on mootness grounds.

4. The ALJ's failure to contact sentencing judge and lack of authority

Wiese next asserts that the ALJ improperly failed to contact the sentencing judge and that the ALJ did not have the authority or jurisdiction to alter his sentence. This "objection" is also simply a restatement of one of Wiese's contentions. However, the court again finds no contrary finding or conclusion in the Amended Report and Recommendation, and the question before Judge Zoss, and now before this court, is not the merits of Wiese's petition, but whether his claims are moot under *Leonard.* Thus, this "objection" is overruled.

5. Exhaustion

Wiese next contends that, contrary to Judge Zoss's finding, he did try to exhaust all

of his claims. However, Wiese has not pointed to any part of the record demonstrating that Judge Zoss improperly concluded that his claims of ineffective assistance of trial and appellate counsel were not properly exhausted, because they had not been presented to any state court, or that Judge Zoss improperly concluded that such claims were rejected on adequate and independent state-law grounds, if they had been presented to a state court. Thus, on *de novo* review, the court finds no basis for overruling Judge Zoss's conclusion that the ineffective assistance of counsel claims should be dismissed. Rather, the petitioner's objection to this portion of the Amended Report and Recommendation must be overruled.

6. "Collateral consequences"

As to Judge Zoss's finding that there were no allegations of any "collateral consequences," Wiese contends, first, that "**[w]hen <u>properly</u> constructed, the collateral <u>consequence is obvious</u>—IT IS THE <u>CONVICTION ITSELF</u>—**I WANT MY SENTENCE BACK." Petitioner's Pro Se Objections at 3 (all emphasis in the original). Wiese argues, further, that he has a viable § 1983 action for over $2,000 in medical bills, plus compensation for resulting pain, from a "trip" on the stairs at the Clarinda Correctional Facility, which occurred while his hands were cuffed behind him. However, neither objection is sufficient to establish "collateral consequences" under *Leonard* to overcome the mootness of Wiese's petition, in light of his release from custody. The first allegation of a collateral consequence is no more than an allegation of a consequence *from Wiese's conviction*, not from serving his sentence in prison rather than in a treatment center. *See Leonard*, 55 F.3d at 373 (the allegedly illegal punishment must produce collateral consequences independent of the underlying conviction). Thus, this objection and/or assertion of "collateral consequences" is overruled. The second allegation of a § 1983 claim for medical bills for injuries suffered while in custody alleges only that Wiese may have a § 1983 claim that is *factually distinct* from the alleged unconstitutional acts that

placed him in the Clarinda facility, not an allegation of "collateral consequences" that were produced by the ALJ's allegedly unconstitutional actions. *See id.* Therefore, this objection, or these objections, must also be overruled.

7. Review of ALJ's actions

Wiese's penultimate objection, or group of objections, begins with his assertion that Judge Zoss erred when he opined, in a footnote, that the ALJ was acting in a judicial capacity, barring any § 1983 action against her, because Judge Zoss did not have any transcript of the hearing. Wiese's objection continues with the assertion that, because the ALJ in question has not taped or otherwise recorded a hearing in four years, Judge Zoss could not properly determine in what capacity the ALJ was acting. The court finds that Judge Zoss offered only an opinion about the capacity in which the ALJ appeared to be acting; however, he did not base his conclusion that Wiese's petition was moot on that opinion. Moreover, the court finds nothing in applicable standards requiring the court to review, *de novo* or otherwise, a parenthetical expression of opinion by a magistrate judge, as opposed to a finding, conclusion, or recommendation. *See* 28 U.S.C. § 636(b)(1).

Wiese then makes a related objection to the mootness of his claims on the ground that, because the ALJ does not record the proceedings, the violation of prisoners' constitutional rights has been "slipping by for four years," and is now "standard operating procedure," preventing appellate or *habeas* review. This objection seems to echo one of the other exceptions to the mootness doctrine, besides the "collateral consequences" exception, which is whether "the issue is deemed a wrong capable of repetition yet evading review." *See Hohn v. United States*, 262 F.3d 811, 817 (8th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3581 (March 5, 2002) (No. 01-1340).[2] As the Eighth Circuit Court of Appeals

[2]In *Hohn*, the court identified the "four exceptions to the mootness doctrine" as the following: "(1) secondary or 'collateral' injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the (continued…)

elsewhere explained,

> This exception applies only in exceptional situations, and only when two factors exist: the challenged action must be of a duration too short to be fully litigated before becoming moot, and there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *See Spencer v. Kemna*, 523 U.S. 1, 17-18, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (placing burden of showing factors on party asserting jurisdiction); *Missouri v. Craig*, 163 F.3d 482, 485 (8th Cir. 1998).

Midwest Farmworker Employment and Training, Inc. v. U.S. Dep't of Labor, 200 F.3d 1198, 1201 (8th Cir. 2000). Wiese has neither alleged nor shown either of these factors. Therefore, Wiese's penultimate group of objections is overruled.

8. Effects of incarceration

Finally, Wiese asserts a sort of general objection to dismissal of his complaint on mootness grounds, which is, in essence, that his life has been ruined as a result of his incarceration. While the court is sympathetic to Wiese's feelings of frustration, despair, or deteriorating mental condition as a result of what he believes was wrongful conduct toward him, the court has found no exception to the mootness doctrine premised on such intangible "collateral consequences," even assuming that they arose from serving his sentence in prison instead of a treatment center, rather than from the conviction itself. *See Leonard*, 55 F.3d at 373 (the allegedly illegal punishment must produce collateral consequences independent of the underlying conviction). Therefore, this final objection must also be overruled.

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[2](…continued)
defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action suit." *Hohn*, 262 F.3d at 817.

III. CONCLUSION

The court concurs in Judge Zoss's conclusion that Wiese's claims of ineffective assistance of counsel have been denied on adequate and independent state-law grounds or have not been exhausted, because they were never presented to the state courts. The court also concurs in Judge Zoss's conclusion that all of the other claims in Wiese's petition have been mooted by his release from custody. Therefore, the court will accept Judge Zoss's recommendation that the respondent's motion to dismiss be granted, with certain modifications identified above. Finally, the court concurs in Judge Zoss's conclusion that Wiese has not raised any issues that might constitute substantial showings that he was deprived of constitutional rights, at least, none that are not now moot. Therefore, the court will accept Judge Zoss's recommendation that a certificate of appealability be denied.

THEREFORE,

1. Petitioner's counsel's objections are **overruled**.

2. Petitioner's *pro se* objections are **sustained in part and overruled in part**, as more specifically stated above.

3. Judge Zoss's July 23, 2002, Amended Report and Recommendation is **modified**, where noted above, to correct the alleged factual background, but is otherwise **accepted**. Consequently,

a. the respondent's January 1, 2002, motion to dismiss is **granted**;

b. this matter is **dismissed in its entirety**; and

c. a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is **denied.**

IT IS SO ORDERED.

DATED this 19th day of September, 2002.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA